

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

TRAVIS WILLIAMS,	)	No. CV 15-05691-AB (KK)
	)	
Plaintiff,	)	MEMORANDUM AND ORDER DISMISSING
	)	COMPLAINT WITH LEAVE TO AMEND
v.	)	
	)	
JOHN SOTO, et al.,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff Travis Williams ("Plaintiff"), a state prisoner proceeding *pro se* and *in forma pauperis*, filed a Complaint pursuant to 42 U.S.C. § 1983 ("Section 1983"), against four defendants employed as Correctional Officers by the California Department of Corrections and Rehabilitation: (1) John Soto, the warden at Lancaster State Prison; (2) Lieutenant G. Marshall; (3) Sergeant G. Rodriguez; and (4) Officer Moisa. The Complaint alleges defendants used excessive force against Plaintiff, threatened retaliation against Plaintiff if he pursued his allegations of excessive force, and attempted to cover up the alleged excessive force. The Court has now screened the Complaint pursuant to 28 U.S.C. § 1915(e)(2). Based upon the reasons set forth

1 below, the Court dismisses the Complaint with leave to amend.

2 I.

3 **PLAINTIFF'S ALLEGATIONS**

4 The Complaint names four defendants: John Soto, the warden at  
5 Lancaster State Prison, Lieutenant G. Marshall, Sergeant G. Rodriguez,  
6 and Correctional Officer Moisa. Complaint at 4-5. Plaintiff sues  
7 each of the four named defendants in both their individual and  
8 official capacities. Id.

9 Plaintiff alleges he was assaulted by Officer Moisa on June 21,  
10 2015. Id. at 1-4. According to the Complaint, as Plaintiff began  
11 walking to the chow line, Officer Moisa hit Plaintiff in the face,  
12 again in the neck, and then twisted his right arm behind his back.  
13 Id. at 2. When Plaintiff jumped backwards, Officer Moisa "attacked"  
14 him with "chemical pepper spray MK-9 Magnum Foam." Id. Plaintiff  
15 alleges that after being sprayed with pepper spray, he was told "to  
16 turn around and lay out, which [he] did." Id. Plaintiff was then  
17 escorted to the program office and placed in a holding cell. Id.

18 After approximately one hour, Sergeant Rodriguez approached  
19 Plaintiff and asked what happened. Id. When Plaintiff explained he  
20 had been subjected to excessive force, Sergeant Rodriguez told  
21 Plaintiff he "would be going to the hole, [his] property would be  
22 lost, and [he] would get it some more if [he] went any further with  
23 these allegations." Id.

24 Plaintiff alleges that "[b]ecause of the threat of further  
25 physical, mental, and emotional harm, [he] did as instructed." Id.  
26 Plaintiff alleges he was instructed to say on video camera that  
27 neither Officer Moisa, nor any other officer, used excessive force.  
28 Id.

1 Plaintiff alleges John Soto, the warden, "failed to properly  
2 train his officers in the use of force (reasonable force) to maintain  
3 control of a situation" and "failed to take corrective action after  
4 the incident was reported." Id. at 6. Plaintiff alleges Lieutenant  
5 Marshall was aware of Sergeant Rodriguez' threats and did nothing, and  
6 failed to take corrective action after learning of the excessive force  
7 allegations. Id. at 2,6.

8 Lastly, Plaintiff alleges "the above named officers attempted to  
9 cover up the excessive use of force (staff misconduct) instead of  
10 taking corrective action." Id. at 6.

11 Plaintiff's sole claim is for violation of the Eighth Amendment  
12 by use of excessive force. Id. Plaintiff seeks monetary relief and  
13 requests that all defendants be reprimanded and relieved of their  
14 duties. Id. at 7.

## 15 II.

### 16 STANDARD OF REVIEW

17 As Plaintiff is proceeding *in forma pauperis*, the court must  
18 screen the Complaint, and is required to dismiss the case at any time  
19 if it concludes the action is frivolous or malicious, fails to state a  
20 claim on which relief may be granted, or seeks monetary relief against  
21 a defendant who is immune from such relief. See 28 U.S.C. §  
22 1915(e)(2)(B); see also Barren v. Harrington, 152 F.3d 1193, 1194 (9th  
23 Cir. 1998).

24 In determining whether a complaint fails to state a claim for  
25 purposes of screening under 28 U.S.C. § 1915(e)(2)(B)(ii), the Court  
26 applies the same pleading standard from Rule 8 of the Federal Rules of  
27 Civil Procedure as it would when evaluating a motion to dismiss under  
28 Federal Rule of Civil Procedure 12(b)(6). See Watison v. Carter, 668

1 F.3d 1108, 1112 (9th Cir. 2012).

2 Under Rule 8(a), a complaint must contain a "short and plain  
3 statement of the claim showing that the pleader is entitled to  
4 relief." Fed. R. Civ. P. 8(a)(2). A complaint may be dismissed for  
5 failure to state a claim "where there is no cognizable legal theory or  
6 an absence of sufficient facts alleged to support a cognizable legal  
7 theory." Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007)  
8 (citation and internal quotation marks omitted). In considering  
9 whether a complaint states a claim, a court must accept as true all of  
10 the material factual allegations in it. Hamilton v. Brown, 630 F.3d  
11 889, 892-93 (9th Cir. 2011). However, the court need not accept as  
12 true "allegations that are merely conclusory, unwarranted deductions  
13 of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig.,  
14 536 F.3d 1049, 1055 (9th Cir. 2008) (citation and internal quotation  
15 marks omitted). Although a complaint need not include detailed  
16 factual allegations, it "must contain sufficient factual matter,  
17 accepted as true, to state a claim to relief that is plausible on its  
18 face." Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation  
19 and internal quotation marks omitted). A claim is facially plausible  
20 when it "allows the court to draw the reasonable inference that the  
21 defendant is liable for the misconduct alleged." Id. (citation and  
22 internal quotation marks omitted). The complaint "must contain  
23 sufficient allegations of underlying facts to give fair notice and to  
24 enable the opposing party to defend itself effectively." Starr v.  
25 Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

26 "A document filed *pro se* is to be liberally construed, and a *pro*  
27 *se* complaint, however inartfully pleaded, must be held to less  
28 stringent standards than formal pleadings drafted by lawyers."

1 Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d  
 2 1081 (2007)(citations and internal quotation marks omitted); Woods v.  
 3 Carey, 525 F.3d 886, 889-90 (9th Cir. 2008). The Court has "an  
 4 obligation where the petitioner is *pro se*, particularly in civil  
 5 rights cases, to construe the pleadings liberally and to afford the  
 6 petitioner the benefit of any doubt." Akhtar v. Mesa, 698 F.3d 1202,  
 7 1212 (9th Cir. 2012) (citation and internal quotation marks omitted).

### 8 III.

#### 9 DISCUSSION

#### 10 A. Plaintiff's Official Capacity Claims

##### 11 1. Requirements for Stating Section 1983 Official Capacity 12 Claims

13 The U.S. Supreme Court has held an "official-capacity suit is, in  
 14 all respects other than name, to be treated as a suit against the  
 15 entity." Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 87  
 16 L. Ed. 2d 114 (1985); see also Brandon v. Holt, 469 U.S. 464, 471-72,  
 17 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985); Larez v. City of Los Angeles,  
 18 946 F.2d 630, 646 (9th Cir. 1991). Such a suit "is not a suit against  
 19 the official personally, for the real party in interest is the  
 20 entity." Graham, 473 U.S. at 166. Because no respondeat superior  
 21 liability exists under Section 1983, a municipality is liable only for  
 22 injuries that arise from an official policy or longstanding custom.  
 23 Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694,  
 24 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); see also City of Canton v.  
 25 Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).  
 26 A plaintiff must show "that a [county] employee committed the alleged  
 27 constitutional violation pursuant to a formal governmental policy or a  
 28 longstanding practice or custom which constitutes the standard

1 operating procedure of the local governmental entity." Gillette v.  
2 Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992) (internal quotation marks  
3 omitted). In addition, he must show that the policy was "(1) the  
4 cause in fact and (2) the proximate cause of the constitutional  
5 deprivation." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996).

## 6 **2. Analysis**

7 Here, Plaintiff sues each defendant in his official capacity, but  
8 fails to identify any official policy or longstanding custom as the  
9 cause of any constitutional deprivation. In fact, the thrust of  
10 Plaintiff's Complaint is that defendants Marshall, Soto, Rodriguez and  
11 Moisa were acting *in violation of* the relevant policies regarding  
12 excessive force. See e.g. Complaint at 6 (alleging defendants'  
13 actions were committed in violation the Eighth Amendment and the Law  
14 Enforcement Code of Ethics). Thus, having failed to identify a custom  
15 or policy, Plaintiff's official capacity claim against defendants  
16 Soto, Marshall, Rodriguez and Moisa must be dismissed.

## 17 **B. Plaintiff's Individual Capacity Claims**

18 In contrast to suits against governmental officers in their  
19 official capacities, individual capacity suits "seek to impose  
20 personal liability upon a government official for actions he takes  
21 under color of state law." Graham, 473 U.S. at 165.

22 "A person deprives another of a constitutional right, within the  
23 meaning of section 1983, if he does an affirmative act, participates  
24 in another's affirmative acts, or omits to perform an act which he is  
25 legally required to do that causes the deprivation of which [the  
26 plaintiff complains]." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.  
27 1978). In short, "there must be a showing of personal participation  
28 in the alleged rights deprivation . . . ." Jones v. Williams, 297

1 F.3d 930, 934 (9th Cir. 2002) (internal citation omitted).

2 **1. Plaintiff's Eighth Amendment Excessive Force Claim**

3 **a. Legal Standard**

4 "When prison officials use excessive force against prisoners,  
5 they violate the inmates' Eighth Amendment right to be free from cruel  
6 and unusual punishment." Clement v. Gomez, 298 F.3d 898, 903 (9th  
7 Cir. 2002). In determining whether the use of force is excessive,  
8 courts are instructed to examine: (1) the extent of the injury  
9 suffered by an inmate; (2) the need for application of force; (3) the  
10 relationship between that need and the amount of force used; and (4)  
11 whether the force was applied in a good faith effort to maintain and  
12 restore discipline. Hudson v. McMillian, 503 U.S. 1, 7, 112 S. Ct.  
13 995, 117 L. Ed. 2d 156 (1992).

14 As with any Eighth Amendment violation, Plaintiff must prove the  
15 "unnecessary and wanton infliction of pain." Whitley v. Albers, 475  
16 U.S. 312, 319-20, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). Neither  
17 accident nor negligence constitutes cruel and unusual punishment,  
18 because "[i]t is obduracy and wantonness, not inadvertence or error in  
19 good faith, that characterize the conduct prohibited by the Cruel and  
20 Unusual Punishments Clause [of the Eighth Amendment]." Id.

21 Not "every malevolent touch by a prison guard gives rise to a  
22 federal cause of action." Hudson, 503 U.S. at 9. "The Eighth  
23 Amendment's prohibition of cruel and unusual punishments necessarily  
24 excludes from constitutional recognition *de minimis* uses of physical  
25 force, provided that the use of force is not of a sort repugnant to  
26 the conscience of mankind." Id. at 9-10. An inmate who complains of  
27 a "push or shove" that causes no discernible injury almost certainly  
28 fails to state a valid excessive force claim. Id. (quoting Johnson v.

1 Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). Where the force is  
2 alleged to have resulted from a personal altercation rather than from  
3 disciplinary action, the "core judicial inquiry" is not whether a  
4 certain quantum of injury was sustained, but rather "whether force was  
5 applied . . . maliciously and sadistically to cause harm." Wilkins v.  
6 Gaddy, 559 U.S. 34, 37, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010) (*per*  
7 *curiam*); see also Hudson, 503 U.S. at 7; Oliver v. Keller, 289 F.3d  
8 623, 628 (9th Cir. 2002) (Eighth Amendment excessive force standard  
9 "examines whether the use of physical force is more than *de minimis*").

10 "[V]erbal harassment generally does not violate the Eighth  
11 Amendment." Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996)  
12 opinion amended on denial of reh'g, 135 F.3d 1318 (9th Cir. 1998)  
13 (holding disrespectful and assaultive comments by prison guard not  
14 enough to implicate Eighth Amendment). Neither are mere threats  
15 generally "sufficiently serious" to violate the Eighth Amendment.  
16 Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 1977, 128 L. Ed. 2d  
17 811 (1994); Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (*per*  
18 *curiam*).

19 Also, a police officer who is merely a bystander to his  
20 colleagues' conduct cannot be found to have caused any injury.  
21 Hopkins v. Bonvicino, 573 F.3d 752, 770 (9th Cir. 2009); see also  
22 Chuman v. Wright, 76 F.3d 292, 295 (9th Cir. 1996) (rejecting a jury  
23 instruction that allowed the jury to "lump all the defendants  
24 together, rather than require it to base each individual's liability  
25 on his own conduct"). Instead, a plaintiff must establish the  
26 "integral participation" of the officers in the alleged constitutional  
27 violation. Torres v. City of Los Angeles, 548 F.3d 1197, 1206 (9th  
28 Cir. 2008) (detective who was not present when suspect was arrested,



1 did not instruct other detectives to arrest suspect, and was not  
2 consulted by other detectives before arrest was not "integral  
3 participant" in use of excessive force).

4 **b. Excessive Force Claim against Defendant Moisa**

5 Here, Plaintiff alleges defendant Moisa hit Plaintiff in the  
6 face, again in the neck, and then twisted his right arm behind his  
7 back. Complaint at 2. When Plaintiff jumped backwards, Officer Moisa  
8 "attacked" him with "chemical pepper spray MK-9 Magnum Foam." Id.  
9 Plaintiff alleges that after being sprayed with pepper spray, he was  
10 told "to turn around and lay out, which [he] did." Id. Based on the  
11 Hudson factors, the Court finds these allegations sufficiently state a  
12 Section 1983 claim of excessive force against defendant Moisa in his  
13 individual capacity. See Hudson, 503 U.S. at 7.

14 **c. Excessive Force Claim against Defendants Soto,**  
15 **Marshall, and Rodriguez**

16 Plaintiff alleges defendant Rodriguez threatened to send  
17 Plaintiff "to the hole," and further physical violence. Complaint at  
18 2. Because threats alone are generally insufficient to state a claim  
19 for violation of the Eighth Amendment, the Complaint fails to state an  
20 excessive force claim against defendant Rodriguez due to his alleged  
21 threats. Keenan, 83 F.3d at 1092; Farmer, 114 S. Ct. at 1977.

22 Additionally, Plaintiff does not allege defendants Soto,  
23 Marshall, or Rodriguez were present during the assault. In fact,  
24 Plaintiff specifically alleges defendant Rodriguez approached him  
25 while he was in the holding cell about an hour after the assault.  
26 Complaint at 2. Plaintiff alleges defendants Soto and Marshall failed  
27 to take corrective action *after* learning of the assault. Complaint at  
28 6. Because defendants Rodriguez, Soto, and Marshall were not present

1 during the assault and were not integral participants in the assault,  
2 the Complaint fails to state an excessive force claim against  
3 defendants Rodriguez, Soto, or Marshall. Torres, 548 F.3d at 1206.

4       **2. Plaintiff's First Amendment Retaliation Claims against**  
5       **Defendant Rodriguez**

6       While the statement of Plaintiff's claims in the Complaint only  
7 alleges a violation of the Eighth Amendment by use of excessive force,  
8 it appears from the factual allegations that Plaintiff is asserting a  
9 First Amendment retaliation claim against defendant Rodriguez.  
10 Complaint at 2, 4, 6. Accordingly, because *pro se* plaintiffs are to  
11 be accorded the "benefit of any doubt" and *pro se* complaints are to be  
12 liberally construed "however inartfully pleaded," the Court construes  
13 the Complaint as alleging a claim for violation of the First Amendment  
14 against defendant Rodriguez. Erickson, 551 U.S. at 94.

15       **a. Legal Standard**

16       Allegations of retaliation against a prisoner's First Amendment  
17 rights to speech or to petition the government may support a Section  
18 1983 claim. See Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995).  
19 Prisoners have a clearly established First Amendment right to file  
20 prison grievances and to be free from retaliation for doing so.  
21 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009). Within the  
22 prison context, a viable claim of First Amendment retaliation entails  
23 five basic elements: (1) the prisoner engaged in protected conduct;  
24 (2) an assertion that a state actor took some adverse action against  
25 an inmate; (3) the adverse action was "because of" the prisoner's  
26 protected conduct; (4) the adverse action chilled the inmate's  
27 exercise of his First Amendment rights; and (5) the action did not  
28 reasonably advance a legitimate correctional goal. Rhodes v.

1 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

2       The Ninth Circuit has held that "an objective standard governs  
3 the chilling inquiry; a plaintiff does not have to show that 'his  
4 speech was actually inhibited or suppressed,' by the adverse action  
5 but rather that the action at issue 'would chill or silence a person  
6 of ordinary firmness from future First Amendment activities.'"  
7 Brodheim, 584 F.3d at 1270 (quoting Rhodes, 408 F.3d at 568-69); see  
8 also Pinard v. Clatskanie School District, 467 F.3d 755, 770 (9th Cir.  
9 2006). Threats of physical harm, while insufficient on their own to  
10 constitute a violation of the Eighth Amendment, may constitute an  
11 "adverse action" in the context of a First Amendment retaliation  
12 claim. Watison, 668 F.3d at 1115-16 (finding defendant officer's  
13 threat to hit plaintiff in the mouth was an "adverse action"); see  
14 also Gomez v. Vernon, 255 F.3d 1118, 1127 (9th Cir. 2001) (holding the  
15 mere *threat* of prison transfers can constitute adverse action for  
16 purposes of retaliation claims). Both litigation in court and filing  
17 inmate grievances are "protected activities" and it is impermissible  
18 for prison officials to retaliate against inmates for engaging in  
19 these activities. See Rhodes, 408 F.3d at 567; Austin v. Terhune, 367  
20 F.3d 1167, 1171 (9th Cir. 2004) (holding placement in administrative  
21 segregation for engaging in such protected activities constitutes an  
22 "adverse action" under Rhodes). "Because direct evidence of  
23 retaliatory intent rarely can be pleaded in a complaint, allegation of  
24 a chronology of events from which retaliation can be inferred is  
25 sufficient to survive dismissal." Watison, 668 F.3d at 1114; Pratt,  
26 65 F.3d at 808 ("timing can properly be considered as circumstantial  
27 evidence of retaliatory intent").

28 ///

1  
2       **b. Analysis**

3       Here, Plaintiff alleges he told defendant Rodriguez and a nurse  
4 "in complete detail that officer Moisa used extreme excessive force  
5 and it was not warranted." Complaint at 2. He also attaches as  
6 Exhibit A to the Complaint a copy of an inmate grievance filled out on  
7 June 21, 2015, the date of the assault, describing the incident in  
8 detail. Id. at Ex. A. Plaintiff was therefore engaged in the  
9 protected activity of filing an inmate grievance.

10       Second, Plaintiff alleges defendant Rodriguez, a Sergeant at  
11 Lancaster State Prison, threatened him with placement in  
12 administrative segregation and physical harm. Therefore, Plaintiff  
13 has alleged that a state actor took adverse action against him.

14       Third, Plaintiff alleges Rodriguez threatened him with placement  
15 in administrative segregation and physical harm "if [he] went any  
16 further with these allegations [of excessive force]." Complaint at 2.  
17 Hence, Plaintiff has alleged the adverse action was "because of" the  
18 prisoner's protected conduct.

19       Fourth, Plaintiff sufficiently pleads chilling conduct that  
20 "would chill or silence a person of ordinary firmness" - threats of  
21 physical violence. See Watison, 668 F.3d at 1116.

22       Finally, the facts Plaintiff alleged implicitly pleaded the fifth  
23 element, because threatening physical violence in retaliation for  
24 engaging in conduct protected by the First Amendment serves no  
25 correctional interest. Id. Plaintiff also alleges he complied  
26 throughout the incident. Complaint at 2. Therefore, it is reasonable  
27 to infer there was no legitimate correctional goal threatening  
28 violence against Plaintiff.

Consequently, the Court finds these allegations sufficiently state a Section 1983 claim of retaliation against defendant Rodriguez in his individual capacity.

#### IV.

**LEAVE TO FILE A FIRST AMENDED COMPLAINT**

For the foregoing reasons, the Complaint is subject to dismissal. As the court is unable to determine whether amendment would be futile, leave to amend is granted. See Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per curiam).

Accordingly, IT IS ORDERED THAT within 21 days of the service date of this Order:

1) Plaintiff may file a First Amended Complaint ("FAC") to attempt to cure the deficiencies with his official capacity and excessive force claims. The Clerk is directed to provide Plaintiff with a Central District of California Civil Rights Complaint Form, CV-66, to facilitate Plaintiff's filing of an FAC if he elects to proceed with this action. Plaintiff is strongly encouraged to use that form.

2) **Alternatively, Plaintiff may voluntarily dismiss all of the identified deficient claims and proceed solely on his remaining claims.** In other words, Plaintiff must file a voluntary dismissal of (i) all claims against defendants Soto, Marshall, Rodriguez, and Moisa in their official capacities, and (ii) his excessive force claim against defendants Soto, Marshall, and Rodriguez in their individual capacities. Plaintiff's remaining claims are (i) excessive force against defendant Moisa in his individual capacity, and (ii) retaliation against defendant Rodriguez in his individual capacity. **If Plaintiff elects to dismiss the deficient claims, he should file within 21 days of the service date of this Order, a document captioned**

1 **"Voluntary Dismissal" in which he identifies the claims he is**  
2 **dismissing from the action.** The Clerk is directed to provide Plaintiff  
3 with a Notice of Voluntary Dismissal Form, CV-09.

4 3) If Plaintiff chooses to file a FAC, the FAC should bear the  
5 docket number assigned to this case, be labeled "First Amended  
6 Complaint," and be complete in and of itself without reference to the  
7 Complaint or any other pleading, attachment, or document.

8 **Plaintiff is admonished that if he fails to timely file a**  
9 **sufficient FAC or notice of voluntary dismissal of the deficient**  
10 **claims, the Court will recommend that this action be dismissed with**  
11 **prejudice for failure to diligently prosecute.**

12  
13  
14 DATED: September 8, 2015

  
HON. KENLY MIYA KATO  
UNITED STATES MAGISTRATE JUDGE